WHICH SUIT WOULD YOU LIKE? THE EMPLOYER'S DILEMMA IN DEALING WITH DOMESTIC VIOLENCE

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I. INTRODUCTION

Unfortunately, all too often violence has become part of the American working environment. It is estimated that between 1.7 and 2 million violent acts occur each year in the workplace.[1] Workplace violence is experienced by 13 of every 1,000 workers.[2] Approximately 1% of all workplace violence was committed by an intimate partner—a current or former spouse, boyfriend, or girlfriend[3]—in what would normally be classified as an incident of domestic violence.[4]

While workplace violence decreased between 1993 and 1999, there were still too many incidents of violence, especially homicides occurring in the workplace, with 651 homicides in 1999 alone.[5] With regard to instances of domestic violence, while the numbers in and out of the workplace also declined, the numbers are still significant. In 1993, 1.1 million females were victims of non-fatal domestic violence, dropping to 588,490 such victims in 2001.[6] Additionally, intimates killed 1,247

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1 *See* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, U.S. DEP'T OF LABOR, OSHA FACT SHEET: WORKPLACE VIOLENCE 1 (2002), *available at* http://www.osha.gov-/SLTC/workplaceviolence/index.html; GREG WARCHOL, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 168634, SPECIAL REPORT, NAT'L CRIME VICTIMIZATION SURVEY, WORKPLACE VIOLENCE, 1992-96 1 (July 1998); DETIS T. DUHART, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 190076, SPECIAL REPORT, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE IN THE WORKPLACE, 1993-99 1 (Dec. 2001).

2 DUHART, *supra* note 1, at 2.

3 WARCHOL, *supra* note 1, at 1.

4 Perhaps one of the best definitions of domestic violence is that offered by Christopher L. Griffin: "Domestic violence occurs when an intimate partner—whether a spouse, former spouse, partner, or former partner—uses physical violence, threats, harassment, emotional manipulation, or financial abuse to control, coerce, or intimidate the other partner." Christopher L. Griffin, *Real Men Take Responsibility for Domestic Violence, in* THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE 1-8 (A.B.A. Comm'n on Domestic Violence 1996).

5 DUHART, *supra* note 1, at 10.

6 CALLIE MARIE RENNISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE,

(*continued*)

females and 440 males in 2000.[7] Thirty-three percent of all female homicides are due to acts of domestic violence.[8]

Homicides are the second leading cause of death in the workplace generally.[9] According to the National Institute for Occupational Safety and Health (NIOSH), homicide is the leading cause of death for females in the workplace, accounting for 40% of all female workplace deaths.[10] Twenty-five percent of female victims were assaulted by people known to them, and 16% of women workplace homicides are a result of domestic violence.[11] In nearly two-thirds of work place assaults, women were the victims.[12]

Twenty-percent of all violent crimes against women were committed by an intimate partner.[13] Eighty-five percent of domestic violence victims are female, and, in recent years, 33% of all murder victims were females killed by a domestic partner.[14] It is estimated that one in five females will be a victim of domestic violence at some point during her lifetime.[15] More than 1.5 million females are victims of domestic violence each year.[16] For

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PUB. NO. NCJ 197838, CRIME DATA BRIEF, INTIMATE PARTNER VIOLENCE, 1993-2001 1 (Feb. 2003).

[7] *Id.*

[8] *Id.*

[9] *See* Guy Toscano & Janice Windau, *National Census of Fatal Occupational Injuries*, *1995*, *in* COMPENSATION AND WORKING CONDITIONS 34-35 (Sept. 1996); *see also Vehicle Crashes Top Other Workplace Hazards; Homicides Emerge as Major Occupational Threat*, 23 O.S.H. Rep. (BNA) No. 27, at 805 (Dec. 1, 1993).

[10] *See Decline in Workplace Deaths Reported; Role of Homicides, Motor Vehicles Detailed*, 22 O.S.H. Rep. (BNA) No. 27, at 2020 (Apr. 28, 1993); Ida L. Castro, Domestic Violence, a Workplace Issue, Facts on Working Women, U.S. Dept. of Labor (Oct. 1996); BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, SUMMARY NO. 94-10, ISSUES IN LABOR STATISTICS, VIOLENCE IN THE WORKPLACE COMES UNDER CLOSE SCRUTINY 1 (Aug. 1994).

[11] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF LABOR, SUMMARY NO. 98-8, ISSUES IN LABOR STATISTICS, WOMEN EXPERIENCE FEWER JOB-RELATED INJURIES AND DEATH THAN MEN 1 (July 1998).

[12] National Institute for Occupational Safety and Health, *Women's Safety and Health Issues at Work* (Jan. 2001), *available at* http://www.cdc.gov/niosh/01-123.html.

[13] RENNISON, *supra* note 6, at 1.

[14] *Id.* at 2.

[15] Ariella Hyman et al., *Laws Mandating Reporting of Domestic Violence: Do They Promote Patient Well-Being?*, 273 JAMA 1781, 1781 (1995).

[16] PATRICIA TJADEN & NANCY THOENNES, NATIONAL INSTITUTE OF JUSTICE AND CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 181867, EXTENT, NATURE AND CONSEQUENCES OF INTIMATE PARTNER VIOLENCE, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY iii (July 2000).

example, 1% of all workplace violence involves domestic violence.[17] Seventy-four percent of female victims of domestic violence are harassed by their abusers on the job, 56% are late for work on several occasions per month, 28% leave work early at least five times per month, 54% miss a minimum of three days per month, and 75% use company time to handle domestic violence-related matters.[18] It has been reported that domestic violence costs employers approximately $5 billion per year in absenteeism, lost productivity, and increased health care costs.[19] It is estimated that one quarter to one half of female victims lose their jobs due to domestic violence.[20]

In 2004, the Society for Human Resource Management (SHRM) published the results of a survey conducted of a number of employer members.[21] That survey reflected that approximately 10% of the responding parties reported incidents of workplace violence.[22] Eleven percent of the responding companies reported violence from girlfriend or boyfriend to an employee, 10% from spouse to employee, and 7% from ex-spouse to employee.[23] Further, the survey reports that the family/marital/personal relationship problems are increasingly a motivation for workplace violence, with 39% reported in the 2004 survey, up from 36% in SHRM's 1999 survey, and 27% in SHRM's 1996 survey.[24]

While workplace violence from any source is obviously a concern for employers, the issues presented when acts of domestic violence spill into the workplace are particularly thorny, as employers face exposure to

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[17] DUHART, *supra* note 1, at 10.

[18] Nancy Hatch Woodward, *Domestic Abuse Policies in the Workplace*, HR MAGAZINE, May 1, 1998, at 116; *see also* RONET BACHMAN & LINDA E. SALTZMAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 154348, SPECIAL REPORT, NAT'L CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 3 (Aug. 1995); LISA D. BRUSH & LORRAINE HIGGINS, U.S. DEP'T OF JUSTICE, PUB. NO. 205021, RESEARCH AND EVALUATION ON VIOLENCE AGAINST WOMEN: BATTERING, WORK, AND WELFARE 4 (2004); U.S. DEP'T OF LABOR WOMEN'S BUREAU, PUB. NO. 96-3, DOMESTIC VIOLENCE: A WORKPLACE ISSUE (Oct. 1996), *available at* http://www.eurowrc.org/06.contributions/1.contrib_en/10.contrib.en.htm.

[19] Woodward, *supra* note 18, at 118.

[20] UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, DOMESTIC VIOLENCE: PREVALENCE AND IMPLICATIONS FOR EMPLOYMENT AMONG WELFARE RECIPIENTS 2 (Nov. 24, 1998) (CAO/HEHS-99-12).

[21] Workplace Violence Survey, Society for Human Resource Management (2004).

[22] *Id.*

[23] *Id.*

[24] *Id.*

liability claims based upon a variety of sources and theories.[25] It is apparent that when domestic violence spills into the workplace, the victims include not only the individuals involved, but also the victim's employer, which must deal with the adverse publicity[26] and often claims made by the individual victims, and too often innocent bystanders, including co-workers, who also may suffer injuries in any violent act.[27]

The focus of this Article is the variety of claims, protections, and interests that an employer must address when domestic violence spills into the workplace. Not only must an employer concern itself with a variety of potential tort-based claims presented by any victim—direct or indirect co-workers and bystanders—but the employer must also consider its actions *vis-à-vis* a variety of statutory claims and protections afforded by federal and state statutes. As discussed in more detail below, the resulting effect of these myriad concerns is often to pose employers in the unenviable position of having to choose which claims or suits they would like to defend—that is, (1) a tort-based claim for injuries suffered at the workplace as a result of the domestic violence related injury; (2) a possible Workers' Compensation claim when the injury occurs at work; or (3) defense of a claim based upon a state or a federal statute affording some protection to domestic violence victims. Finally, and in an area of increasing concern, are those circumstances where the employer, to avoid having to deal with domestic violence issues in the workplace, terminates the involved employee, as employers are increasingly facing wrongful-discharged suits for terminating such employees.

So Mr. or Ms. Employer, which suit would you like to defend?

II. TORT-BASED LIABILITY

Media reports often contain several stories about domestic violence incidents in the workplace. Often the stories report multi-million dollar

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[25] Non-domestic violence related issues are beyond the scope of this Article. For information on "general" workplace violence, see Ann E. Phillips, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139 (1996); Amy D. Whitten & Deanne M. Mosley, *Caught in the Crossfire: Employers' Liability for Workplace Violence*, 70 MISS. L.J. 505 (2000). Similarly, sexual harassment claims are also not included in this Article, except to the extent that such claims were made as part of an ongoing relationship that went sour, leading to those instances that were the basis for sexual harassment claims discussed in this paper under Title VII. *See infra* Part III.A.

[26] *See, e.g.*, Laura Trujillo, *Family Sues After Workplace Slaying*, PORTLAND OREGONIAN, May 18, 1997, at D3; Maria Alicia Gaura & Marshall Wilson, *Ex-Employee Kills Himself, Former Girlfriend at Work*, SAN FRANCISCO CHRON., Aug. 23, 1997, at A1.

[27] *See* The National Center for Victims of Crime, *Workplace Violence: Employee Information*, *at* http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32374 (last visited Dec. 14, 2004).

lawsuits; often they report multi-million dollar verdicts; often they report substantial settlements. For example, in one case, a former boyfriend called his partner's employer and demanded that she be fired.[28] When the employer refused, the boyfriend advised that he would come to her work and kill her, which he did.[29] The parties settled the claim of the decedent's family for more than $350,000.[30] In another case, a husband appeared at the wife's workplace and opened fire with a shotgun. The husband killed two employees and wounded nine.[31] Because the employer had been warned of the husband's threats and the employer did not beef up security, the jury awarded the plaintiffs $5 million.[32] An employer's liability exposure for a domestic violence incident in the workplace claim may be limited only by what a jury perceives to be "fair" or "just" compensation. Thus, employers should be very concerned about tort-based claims.

Most tort claims that an employer might face in the circumstances discussed herein would probably be based on some form of negligence—the failure to act as a reasonable person under the circumstances that leads to (causes) an injury.[33] In the employment setting, the employer must keep in mind that often the injured parties (the potential plaintiffs) may not only be the target of the domestic violence, but, as indicated above, targets may also be co-workers or other bystanders. From an employer's perspective, it might seem unfair to make them liable for the actions of third parties who commit acts of domestic violence in the workplace; but, it is clear that domestic violence does occur in the workplace, sometimes for no other reason than the perpetrator knows where the victim is going to be at some particular point in time—at work.

For the most part, the law does not recognize a duty to protect persons from the acts of third parties, as there is no liability for the acts of those third parties.[34] However, there are exceptions to this general rule. Where "special relations" exist between the parties, a duty to protect may arise.[35]

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[28] Jennifer Liebrum, *Man Gets Life in Woman's Slaying,* HOUSTON CHRON., Feb. 17, 1993, at C10.

[29] *Id.*

[30] Joseph Pereira, *Employers Confront Domestic Abuse*, WALL ST. J., Mar. 2, 1995, at B1.

[31] *Id.*

[32] *Id.* The Paziotopoulos Group, LTD, Consultant Specialists in Domestic Violence and Stalking Risk Management, *Defining Workplace Domestic Violence: What Is It?*, *available at* http://www.paziogroup.com/defining.htm (last visited Dec. 14, 2004).

[33] *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965).

[34] *See id.* § 315.

[35] *Id.* § 314A; *see also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33 (W. Page Keeton ed., 5th ed. 1984).

Employment has been noted to create such a "special relation."[36] Moreover, when parties voluntarily assume a duty to protect another, they may be liable for their failure to do so.[37]

Finally, a duty to protect against the acts of a third party may arise where an injury or harm is foreseeable.[38] While the existence of duty is normally a question of law to be determined by a judge in the first instance, courts have discretion to determine duty as a matter of policy as to whether an employee is entitled to protection.[39] Forseeability is generally a question of fact for a jury's determination, decided as an issue of law only if reasonable minds can come to only one conclusion.[40] There is also authority imposing a duty to act on an employer where there is a known threatened harm that the employee might encounter within the scope of his or her employment.[41]

As noted above, for a plaintiff to prevail in a negligence claim, there must be a causal relationship between the alleged breach of duty and the injury suffered; the law also recognizes that the acts of a third party may constitute an intervening or superseding cause of injury, thereby relieving parties of liability for their negligence.[42] However, the idea of a superseding or intervening cause is not absolute; in some instances, the

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[36] RESTATEMENT (SECOND) OF TORTS § 314A cmt. a (1965); *see also* Lillie v. Thompson, 332 U.S. 459, 462 (1947); Isaacs v. Huntington Mem'l Hosp., 695 P.2d 653, 657, 665 (Cal. 1985).

[37] RESTATEMENT (SECOND) OF TORTS § 324A (1965). This section provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
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> (a) his failure to exercise care increases the risk of such harm, or
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> (b) he has undertaken to perform a duty owed by the other to the third person, or
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> (c) the harm is suffered because of the reliance of the other or the third person upon the undertaking.

Id.

[38] Phillips, *supra* note 25, at 168.

[39] *See* KEETON ET AL., *supra* note 35, § 53.

[40] Phillips, *supra* note 25, at 169; *see also* cases cited *infra* Part II.

[41] RESTATEMENT (SECOND) OF TORTS § 314B (1965). Of course, the issue remains: was an act of domestic violence at work within the scope of employment? *See* cases cited *infra* notes 123-46. These cases deal with Workers' Compensation availability and reach different conclusions.

[42] *See* RESTATEMENT (SECOND) OF TORTS § 447 (1965).

superseding or intervening cause does not relieve a party of liability for his or her negligence.[43] The Restatement (Second) of Torts notes that a party may remain liable for negligence when

> [t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.[44]

Thus, while an employer might initially perceive that its liability on a tort-based claim would be limited due to a lack of any duty owed to its employee, or the fact that any injuries would be the result of acts of third parties, the law clearly provides that duties may be implied because of the employer-employee relationship, the voluntary assumption of a duty to protect and provide security, or the forseeability of harm from a third party. Further, where the employer knew or should have known of the forseeability of the third party's acts, there may be no break in the chain of causation.[45]

For the most part, tort-based claims against employers are based on the following three main theories: (1) failure to protect and provide adequate security; (2) negligent retention; and (3) failure to warn. As discussed in greater detail below, employers may also face claims for the tort of wrongful discharge when, presumably in attempt to keep domestic violence concerns out of the workplace, the involved employee is terminated.[46] For a plaintiff to recover on any of the listed theories, he or she must prove that the employer knew or should have known of a foreseeable risk of injury or harm to the injured employee.[47] The cases discussed below demonstrate how fact-driven a determination of such issues is.

In a particularly well-reasoned and analyzed opinion, Judge Franklin Van Antwerpen addressed claims from an employee who was shot by her husband prior to starting work while in the break room of the Wal-Mart

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43 *Id.* § 448.

44 *Id.*

45 *See id*. § 314B.

46 *See infra* notes 211-40 and accompanying text.

47 *See* RESTATEMENT (SECOND) OF TORTS § 314B (1965).

store where she was employed.[48] The plaintiff alleged that Wal-Mart was negligent in failing to protect her from her husband's assault, failing to call the police when her husband appeared at the store, failing to provide reasonable protection when Wal-Mart allegedly voluntarily assumed a duty to protect the plaintiff, and committing negligent entrustment.[49] The facts of the case are important because, for the most part, the individuals involved, a husband and wife, had no real history of domestic violence.[50]

On the morning of August 26, 1999, the husband assaulted the plaintiff and was then arrested and charged with assault.[51] As a condition of his bail, the husband was told to stay away from the plaintiff.[52] The plaintiff reported the domestic violence incident to the store manager and another supervisory employee.[53] Over the next few days, the husband appeared at the store on several instances without incident.[54] In fact, the plaintiff never even requested that Wal-Mart ban her husband from the store.[55] On one visit, the husband, who hunted as a hobby, purchased a .22 caliber rifle and bullets.[56] A few days after that, on the morning of the shooting, the husband appeared at the store and was calm and polite when he spoke with a management employee before going back to the break room, where he had a normal conversation with the plaintiff for several minutes.[57] As the plaintiff started to leave the room, the husband pulled out the rifle and shot her before killing himself.[58] The plaintiff survived.[59] At the time of the shooting, the parties' daughter was also present in the store and was aware that her father was present.[60]

The court's opinion is particularly instructive, as Judge Van Antwerpen goes to great lengths to discuss the employer's duties in light of the law set out in the Restatement sections discussed above, as adopted by various Pennsylvania courts.[61] First, addressing whether Wal-Mart owed the plaintiff any duty to protect against the husband's actions, the

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48 Midgette v. Wal-Mart Stores, Inc., 317 F. Supp. 2d 550, 555 (E.D. Pa. 2004), *aff'd*, 2005 U.S. App. LEXIS 3573 (3d Cir. Mar. 3, 2005).

49 *See id.* at 555-56.

50 *Id.* at 553.

51 *Id.*

52 *Id.* at 554.

53 *Id.*

54 *Id.*

55 *Id.* at 560.

56 *Id.* at 555.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *See id.* at 557-58.

court noted that no Pennsylvania court had adopted the "special relations" language set out in Restatement (Second) of Torts section 314A, comment a, which describes the employer/employee relationship as "special relations"; thus, the court declined to recognize an inherent duty to protect.[62] The court went further, however, stating that the employer had no duty under the Restatement (Second) of Torts section 314B, as the employer was not aware of any "imminent danger of serious harm" to the plaintiff.[63] Moreover, the court noted that even if there were "special relations" giving rise to a duty to protect, there was no knowledge on the part of Wal-Mart that any danger existed or was foreseeable.[64] The plaintiff's husband had been in the store a number of times since the assault, without incident, and without the plaintiff even requesting that he be barred from the store.[65] On the day of the shooting, the husband appeared polite and normal in conversations with Wal-Mart personnel and engaged the plaintiff in a reasonably normal conversation for some time prior to the shooting.[66] The court noted that the parties' daughter, aware of the assault and relationship problems suffered by her parents, even remained in the store, shopping.[67]

With regard to the plaintiff's claim based upon the alleged failure to protect when Wal-Mart supposedly assumed the duty to protect, the court found there was no such duty.[68] Wal-Mart was unaware of any threat, and the mere assistance of getting the plaintiff out of the store by the back door in one instance when her husband appeared did not constitute an assumption of any duty to protect, especially since the plaintiff never requested any specific protection, such as barring the husband from the store.[69]

The court also found the plaintiff's claim based on Wal-Mart's status as a landowner to be unconvincing, as Wal-Mart had no actual or constructive knowledge of the act that the husband was about to commit.[70] Similarly, the court found that the plaintiff's negligent entrustment claim, based upon Wal-Mart selling the deceased husband the bullets used to

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62 *See id.* at 558-59.

63 *Id.* at 558.

64 *Id.* at 559.

65 *Id.* at 560.

66 *Id.* at 555.

67 *Id.* at 559.

68 *Id.* at 560.

69 *Id.* at 560-61.

70 *Id.* at 562; *see also* RESTATEMENT (SECOND) OF TORTS § 314 (1965) (establishing that a landowner has a duty to protect invitees from the intentional torts of third parties when the landowner has actual knowledge of an act's occurrence or a likelihood of occurrence based upon prior experience).

shoot the plaintiff, had little merit, as bullets were commonly sold in the store, the plaintiff's husband was a hunter, and the plaintiff's husband could have purchased the bullets elsewhere or could have used another weapon to injure the plaintiff.[71]

Finally, the court noted that even if there was some duty that Wal-Mart breached, that breach was not a proximate cause of the plaintiff's injury.[72] Noting that section 433 of the Restatement set out certain factors to consider in determining proximate cause—including the "number of other factors which contribute[d] in producing the harm," whether the "[defendant's] conduct created a force or series of forces which [caused the harm]," or "created a situation [that was] harmless unless acted upon by other forces," and "lapse of time"[73]—the court found that Wal-Mart did nothing to cause the shooting or to allow it to happen.[74]

A similar case, under seemingly more egregious circumstances, reached a similar result. *Carroll v. Shoney's, Inc.*[75] involved incidents that occurred on September 22, 1995 and September 23, 1995.[76] The circumstances involved a husband and wife with a prior history of "arguments," causing the wife, Mildred Harris, to request time off from work.[77] On the night of September 22, 1995, Mildred appeared at work and advised her on duty manager that her husband, Ronnie Harris, had beaten, choked, and threatened her the night before.[78] Mildred told her manager that she was afraid of her husband, did not want to talk to him, and she asked that the police be called if Ronnie appeared at the restaurant.[79] At about 10:00 p.m., Ronnie Harris appeared at the restaurant, pushed his way past the manager, and confronted his wife at the rear of the restaurant, yelling and threatening to "get her."[80] Despite the manager's attempts to get Ronnie to leave, he remained until the police arrived and escorted him off the premises.[81] After the confrontation, Mildred was taken to a nearby hotel room, the cost of which was paid for

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[71] *See Midgette*, 317 F. Supp. 2d at 567; *see also* RESTATEMENT (SECOND) OF TORTS § 318 (1965) (imposing liability for negligent entrustment only if the defendant knew or should have known that the instrument entrusted would be used in such a manner as to create an unreasonable risk of harm).

[72] *See Midgette*, 317 F. Supp. 2d at 563, 568.

[73] *Id.* at 564.

[74] *Id.*

[75] 775 So. 2d 753 (Ala. 2000).

[76] *Id.* at 754.

[77] *See id.* at 754-55.

[78] *Id.* at 754.

[79] *Id.*

[80] *Id.*

[81] *Id.*

by loans from co-workers.[82]

The next morning, the manager who had been on duty the previous night advised the incoming manager of the incident.[83] When Mildred called to ask for the day off due to the incident and threat, she was told to show up for work with the assurance that if Ronnie appeared, the police would be called.[84] Mildred Harris came to work and was assigned to work the front counter.[85] At some point, Ronnie came into the restaurant and shot Mildred in the back of the head, killing her.[86] Mildred's father, as administrator of her estate, filed suit against Shoney's, arguing that Shoney's breached its duty to protect Mildred from Ronnie.[87]

The trial court entered summary judgment in Shoney's favor,[88] which was upheld on appeal.[89] The Alabama Supreme Court found that summary judgment was appropriate, as (1) Shoney's owed Mildred no duty to protect because there was no "special relationship" under Alabama law,[90] and (2) the acts of Ronnie Harris in shooting his wife were not foreseeable, thus creating an exception to the "no duty to protect" general rule.[91] Holding that the only time an exemption was created, thus giving rise to a duty to protect, was when "the particular criminal conduct was foreseeable,"[92] the court found that it was not foreseeable that Ronnie would murder his wife.[93] The court noted that the plaintiff was required to establish the following three elements to recover: (1) the particular conduct must be foreseeable; (2) the defendant must possess "specialized knowledge" of the criminal activity; and (3) the criminal conduct must have been a probability.[94] Since there was no evidence that any employee of Shoney's should have reasonably foreseen that Ronnie would enter the restaurant and murder Mildred, and since even the plaintiff himself, Mildred's father, did not believe Ronnie would murder his wife, the court ruled that the plaintiff's claim must fail under Alabama law.[95]

In a very well-reasoned dissent, Justice Johnstone argued that the

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82 *Id.*

83 *Id.*

84 *Id.* at 755.

85 *Id.*

86 *Id.*

87 *Id.* at 754.

88 *Id.*

89 *Id.* at 757.

90 *See id.* at 755-56.

91 *See id.* at 755.

92 *Id.* at 756 (quoting Henley v. Pizitz Realty Co., 456 So. 2d 272, 276 (Ala. 1984)).

93 *Id.* at 757.

94 *Id.* at 756.

95 *Id.* at 757.

majority's ruling was too narrow and harsh.[96] Justice Johnstone stated:

> The crucial issue is not whether the murder was foreseeable, but whether violence and injury, fatal or not, were foreseeable. Had the husband slapped the deceased, would anyone say the slapping was not foreseeable? If he had blackened her eye or broken her nose or knocked her teeth down her throat, would anyone say any of these batterings was not foreseeable? Is the defendant less liable because the husband killed her?[97]

Noting the incidents that Shoney's was aware of—the violent acts at home, the violent trespass the night before the shooting, and the specific assurance given that the police would be called if Ronnie again came into the restaurant—Johnstone argued that Shoney's breached its duty to protect because "[t]he husband's injuring the deceased was not just foreseeable, but was expectable."[98]

Another case where forseeability was the determining factor in whether the defendant/employer owed a plaintiff/employee a duty to protect is *Clark v. Carla Gay Dress Co.*[99] This case again demonstrates how fact-driven issues of forseeability are. In this instance, the plaintiff, Barbara Clark, separated from her husband Willie in August of 1980, advising her supervisor that "her work had slowed down because of her domestic problems," and telling her supervisor that "her husband beat her and would shoot up heroin," that he was addicted to drugs, and that she wanted no contact with him.[100] Barbara's employer, Carla Gay Dress, Co., allowed spouses and children to visit employees briefly at work, and Barbara's husband had visited Barbara there on several occasions, apparently even after the divorce was filed.[101]

On October 1, 1980, Willie appeared at Barbara's work, requesting to see their baby.[102] In a conversation that took place at Barbara's sewing machine, the two had a "calm discussion" for three or four minutes.[103] Willie started to leave the building, but when he reached the door, he asked Barbara's supervisor if he could again speak to Barbara.[104] The supervisor asked Barbara if she wanted to speak with her husband, and

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96 *Id.* at 757 (Johnstone, J., dissenting).

97 *Id.*

98 *Id.* at 757-58.

99 342 S.E.2d 468 (Ga. App. 1986).

100 *Id.* at 469.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

Barbara declined.[105] When the supervisor advised Willie that Barbara did not wish to speak with him, he again asked if he could speak with her for just a moment.[106] "During all these [conversations], Willie was very nice and calm; he was not pushy and not persistent or insistent. He was 'perfectly peaceable,' and that is why the [supervisor] thought he would leave and did not see to it that he did leave."[107] After the supervisor relayed the renewed request from Willie, Barbara went to speak to her husband.[108] The parties spoke calmly for about seven minutes, with Barbara telling her husband that she would arrange for him to see the baby.[109] As the plaintiff turned to walk away, Willie grabbed her by the wrists, pulled a gun out of his shirt, and started shooting.[110] Barbara had never before known Willie to have a gun.[111] She ran into a nearby room, but Willie forced his way into that room and shot her in the head.[112]

Barbara filed suit against her employer for negligence, and at trial, the court granted a directed verdict in the employer's favor.[113] On appeal, the appellate court spent considerable time discussing the "equal knowledge" rule that had been an issue in the trial court below.[114] That rule essentially states that where a plaintiff has equal or greater knowledge of a hazard, the defendant may escape liability when the plaintiff is injured as a result of that hazard.[115] However, the appellate court noted that the "equal knowledge rule" was not determinative in this case.[116]

Asserting that the equal knowledge rule was not an absolute bar to a plaintiff's recovery in any instance, the court went on to state that the defendant's liability was founded upon the forseeability of the consequences that plaintiff's husband would injure her under these circumstances.[117] The court noted that "[t]he true basis of liability in such a case is the *forseeability* of the consequences by the proprietor, which consequences the plaintiff could not avoid with use of ordinary care."[118] The court further stated that Barbara herself, despite the prior instances of

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105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.* at 470.
113 *Id.* at 469.
114 *See id.* at 470-72.
115 *See id.* at 470.
116 *Id.*
117 *Id.* at 471.
118 *Id.*

domestic violence, was not too concerned with any potential violence from her husband.[119] The court stated as follows:

> Indeed, it appears from her testimony, that she was *not* afraid that he would physically attack her in the factory. She spoke to him calmly for several minutes when he arrived, and there is no evidence at all that he did or said anything to cause her or *the defendant Carla Gay* to fear for her safety. When he asked to speak to her again, he was very nice and calm, and not pushy, and was 'perfectly peaceable.'[120]
>
> . . . .
>
> It is very clear that appellant did not herself foresee the physical danger she was in and we can find no circumstance from which Carla Gay's management should have reasonably foreseen it. It is not a matter of appellant's having equal knowledge of the danger, but rather that Carla Gay could not reasonably foresee any danger because there was in fact no warning or indication of it. As for appellant's suggestion that Carla Gay was negligent in allowing the husband on the premises in the first place, there is no general duty to keep spouses off business premises and Carla Gay did not have notice of the dangerous conduct on the part of the husband '*on the occasion in question.*'[121]

Thus, the court affirmed the directed verdict granted to Carla Gay.[122]

In *Panpat v. Owens-Brockway Glass Container, Inc.*,[123] a case where the employer had first-hand knowledge of several outbursts between the parties, and the parties attempted to be separated at work (they were co-workers), the court found that it was foreseeable that some act of violence might occur, and therefore allowed the plaintiff's negligence claims to proceed to the jury.[124]

In this case, Ann Achara Tanatchangsang worked with her former boyfriend, Chris Blake, at Owens-Brockway on the graveyard shift.[125] For a period of time, the parties lived together, but in November of 1995, Ann moved out of Chris' home and made repeated efforts to keep him from

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119 *Id.* at 472.

120 *Id.*

121 *Id.* (emphasis in original).

122 *Id.*

123 71 P.3d 553 (Or. Ct. App. 2003).

124 *Id.* at 558.

125 *Id.* at 554.

discovering where she was living.[126] Chris became depressed and entered an inpatient chemical dependency program, with Owens-Brockway putting him on medical leave.[127] The company nurse and other employees, including the plant superintendent, were aware of the difficulty Chris was having in coping with the break up of this relationship.[128] Chris requested that Ann be transferred to a different shift, which management personnel explored with Ann, but she declined and even threatened to file a sex discrimination case if she were transferred because of her boyfriend's problem.[129] When Ann refused to be transferred to a different shift, both Ann and Chris remained on the graveyard shift, and Owens-Brockway took no further steps to separate them.[130]

Chris continued to have problems, including psychiatric hospitalization due to suicidal ideation because he made several suicide attempts.[131] In January 1986 and again in March 1986, Ann complained to her supervisor that Chris had called her obscene names during their work shift.[132] The shift supervisor cautioned Chris that Owens-Brockway would not tolerate this conduct.[133] Over the next several weeks, Chris called in sick often and was then placed on sick leave.[134] Shortly after midnight on April 26, 1986, Chris entered Owens-Brockway, walked past the guards, and forced Ann into the bathroom at gunpoint.[135] He shot her three times and himself once, killing them both.[136]

Ann's estate filed suit against Owens-Brockway, alleging negligence in failing to instruct security officers to refuse Blake's entry into the plant, failing to provide training to the security officers, and in failing to provide a secure workplace for the decedent.[137] The trial court granted the defendant's motion for summary judgment, and the appellate court affirmed.[138] However, the Oregon Supreme Court reversed and remanded the case.[139]

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126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.*

131 *Id.* at 555.

132 *Id.*

133 *Id.*

134 *Id.*

135 *Id.*

136 *Id.*

137 *Id.*

138 Panpat v. Owens-Brockway Glass Container, Inc., 21 P.3d 97, 97 (Or. Ct. App. 2001).

139 Panpat v. Owens-Brockway Glass Container, Inc., 49 P.3d 773, 773 (Or. 2002).

The issues raised in the appeal to the Oregon Supreme Court concerned whether Workers' Compensation provided the exclusive remedy for decedent's estate.[140] The court answered this question in the negative and remanded the case to the court of appeals to reconsider whether the case should proceed to a jury on the negligence claims since Workers' Compensation was not the exclusive remedy.[141] On the second appeal, the appellate court found that because Owens-Brockway had first hand knowledge of Chris' threats toward Ann, his hospitalization for suicidal ideation and attempts, and the animosity between Ann and Chris, the court could not determine, as a matter of law, that there was no foreseeable risk of Chris killing Ann.[142] The court noted that since Owens-Brockway knew that Chris had been diagnosed with an explosive disorder in conjunction with the break-up of the relationship with Ann, Chris was on medical leave due to mental health problems as a result of the break-up, Chris was not authorized to return to work when he did, Chris had made attempts to be separated from Ann while at work, and since Chris had engaged in obscene verbal confrontations with Ann on two occasions, the court was unwilling to say that, as a matter of law, Chris' assault and murder of Ann was unforeseeable.[143]

The decision in *Panpat* is quite obviously contrary to the position taken by the Alabama Supreme Court in *Carroll v. Shoney's, Inc.* In both instances, the employer had knowledge of acts of physical violence committed against their employees.[144] In fact, the Shoney's violence, where a manager was pushed aside so that the assaulter could get to his victim, is arguably more egregious.[145] The reasoning in *Panpat* would seemingly be more supportive of the position taken by the dissent in *Carroll*[146] and demonstrates the exposure that employers would have where they are either aware firsthand of animosity between the domestic violence victim and the assaulter, or are made aware of such animosity by the employee. From the employer's perspective, forseeability of risk can be a very tricky concept.

In some instances, plaintiffs have attempted to rely upon statutes or executive orders to establish a standard of care and to avail themselves to the doctrine of negligence per se. Negligence per se attends where a statute exists that establishes the standard of care, the statute was enacted to prevent the type of injuries suffered by the plaintiff, and the plaintiff

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140 *Id*. at 774.

141 *Id.*

142 *Panpat*, 71 P.3d at 558.

143 *Id.*

144 *See id*. at 554; Carroll v. Shoney's Inc., 775 So. 2d 753, 754 (Ala. 2000).

145 *Compare Carroll*, 775 So. 2d at 754, *with Panpat*, 71 P.3d at 554-55.

146 *See Carroll*, 775 So. 2d at 757-58 (Johnstone, J. dissenting).

was within the class of persons meant to be protected by the statute.[147] In *Midgette v. Wal-Mart Stores, Inc.*,[148] the plaintiff attempted to create a legal duty on the part of the employer based upon the Occupational Safety and Health Act's (OSHA) general duty clause[149] to provide "a place of employment . . . free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.[150] After noting that OSHA did not provide a private cause of action, the court in *Midgette* stated that the general duty clause only required employers to use reasonable care to furnish employees with a safe place to work with respect to injuries suffered while employees carried out job responsibilities, and since there were no specific regulations that Wal-Mart violated, as none existed, the general duty clause could not act as a statute to establish negligence per se.[151]

In similar fashion, in *Fischer-McReynolds v. Quasim*,[152] the plaintiff attempted to use an executive order issued by the governor of Washington directing state agencies to develop policies and procedures related to domestic violence as a basis for a negligence per se claim.[153] She argued that since her public employer did not have such policies and procedures in place, it had breached a mandated requirement and thereby violated a duty owed to the plaintiff.[154] The court of appeals made short work of the plaintiff's argument, noting that an executive order was a directive to agency heads and did not create a cause of action authorizing an award of monetary damages for any alleged failure to comply with that order.[155]

There are several statutes at the state and federal level that are pertinent to an employer's consideration of domestic violence occurring in the workplace.[156] However, at this point, plaintiffs have been unsuccessful in using any statutory enactment as a basis for a negligence per se tort claim.

Employers also ought to be aware that negligent retention claims may form the basis of liability in domestic violence cases. In fact, numerous

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[147] *See* KEETON ET AL., *supra* note 35, § 36; *see, e.g.*, Cowan v. Laughridge Constr. Co., 291 S.E.2d 287, 289 (N.C. Ct. App. 1982) (holding that noncompliance with a federal statute that was penal in nature fails to constitute negligence per se).

[148] 317 F. Supp. 2d 550, 558 n.1 (E.D. Pa. 2004), *aff'd*, 2005 U.S. App. LEXIS 3573 (3d Cir. Mar. 3, 2005).

[149] 29 U.S.C. § 654(a)(1) (2000).

[150] *Midgette*, 317 F. Supp. 2d at 558 n.1.

[151] *Id.*

[152] 6 P.3d 30 (Wash. Ct. App. 2000).

[153] *Id.* at 33, 36.

[154] *See id.* at 35.

[155] *See id.* at 37.

[156] *See* discussion *infra* Part III.

cases have established that an employer may be liable for acts of violence committed by an employee against a third person.[157] While negligent retention issues often arise where the individual participants to the domestic violence are both employees, there is also precedence for negligent retention claims where the employee injured his spouse who was not a co-worker.

The best example of co-worker violence and negligent retention claims arising therefrom is *Yunker v. Honeywell, Inc*.[158] The facts of *Yunker* are particularly egregious. Randy Landin was a Honeywell employee from 1977 to 1979 and again from 1984 to 1988.[159] From 1979 to 1984, Landin was imprisoned for the strangulation death of a Honeywell co-employee.[160] When he was released from prison, Honeywell rehired Landin as a custodian.[161] On his rehire, Landin still engaged in workplace confrontations, which necessitated two transfers prior to the incident at issue.[162]

In April of 1988, Kathleen Nesser was assigned to Landin's maintenance crew.[163] They became friends and spent some time together away from work; however, when Landin expressed a romantic interest, Nesser terminated the relationship.[164] Landin began to harass and threaten Nesser at work and at home, and at the end of June, Landin's threats caused Nesser to seek help from her supervisor and to request a transfer.[165] On July 1, 1988, Nesser found a death threat on her locker.[166] Landin did not come to work on or after July 1, and he resigned July 11, 1988.[167] On July 19, six hours after her shift ended, Landin killed Nesser with a shotgun in her driveway.[168]

Yunker, as an estate representative, filed a wrongful death action based upon theories of negligent hiring, retention, and supervision of a

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[157] *See generally* Whitten and Mosley, *supra* note 25 (discussing legal liability and the tools employers can use to prevent workplace violence). *See also* RESTATEMENT (SECOND) OF AGENCY § 213 cmt. d (1958) (stating that an employer "may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him").

[158] 496 N.W.2d 419 (Minn. Ct. App. 1993).

[159] *Id.* at 421.

[160] *Id.*

[161] *Id*.

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

dangerous employee.[169] At trial, the court granted Honeywell's motion for summary judgment.[170] On appeal, the court affirmed the dismissal of the negligent hiring claim, and the court of appeals noted that the defendant did not owe the decedent any duty with regard to the actual hiring of Landin.[171] However, the court found that the summary judgment as to the negligent retention and negligent supervision claims was improper.[172] As the other decisions discussed herein have done, the appellate court carefully examined the facts and determined that since Honeywell was aware of Landin's violent background and temperament, not only from the prior strangulation conviction, but also based upon the specific incidents, including the death threat and Nesser's reporting these incidents to management, it was foreseeable that Landin posed a threat to Nesser, and that forseeability gave rise to a duty to terminate Landin's employment.[173] The court specifically noted that Landin's history made it foreseeable that Landin could act violently against any employee, and against Nesser in particular, and that this forseeability gave rise to a specific duty of care to Nesser.[174] The court was careful to point out that its ruling that forseeability of harm gave rise to a duty did not indicate that Honeywell was liable for a breach of that duty.[175] Instead, the court specifically noted that that breach was a question of fact to be determined by a jury.[176]

Another case of interest, *Braswell v. Braswell*,[177] which involved police officers, reached a different conclusion on a negligent retention basis. Perhaps a distinction should be kept in mind in evaluating this case, as the perpetrator's job required him to carry a firearm, which the perpetrator used to commit a homicide in a domestic violence act.[178] Indeed, it would seem appropriate, in the evaluation of such a claim, to impose a higher duty of care on an employer who requires an employee to carry a firearm.

Braswell involved the murder of Lillie Braswell by her estranged husband, Deputy Sheriff Billy Braswell.[179] Billy had been a deputy sheriff for the Pitt County Sheriff's Office for thirteen years.[180] During that time,

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169 *Id.*
170 *Id.*
171 *Id.* at 423.
172 *Id.* at 424.
173 *Id.*
174 *Id.*
175 *Id.*
176 *Id.*
177 410 S.E.2d 897 (N.C. 1991).
178 *See id.* at 901, 904.
179 *Id.* at 899.
180 *Id.*

Lillie had advised the Sheriff of Pitt County on a number of occasions of incidents of domestic violence and threats, including instances where Billy threatened her with a firearm.[181] After years of such incidents, in September of 1982, Lillie moved out of the marital residence.[182] She met that morning with the Sheriff and related her fears that Billy would kill her, noting that Billy's behavior was becoming more and more irregular, including sitting and staring at her while holding three sealed envelopes in his hand.[183] When Lillie moved out of the residence, she located the three envelopes and discovered that they contained letters to the couple's son Mike explaining why Billy intended to kill his son's mother.[184] The letters clearly indicated a concern that Mike understand why Billy was going to kill Lillie.[185]

Lillie spoke with an attorney[186] and kept the Sheriff advised of what was going on, including informing him of the content of the letters.[187] The Sheriff's response was to have another deputy talk with Billy, and that deputy reported back to the Sheriff that, in his opinion, the couple was just having marital problems.[188] On the morning of September 27, 1982, Lillie's body was found on the side of a road in Farmville, North Carolina by a passing motorist.[189]

At the trial of the suit filed by the representative of the couple's son against the Sheriff of Pitt County, the trial court granted a directed verdict in the Sheriff's favor at the end of plaintiff's case.[190] The appellate court affirmed the directed verdict with respect to the negligent supervision and retention claim presented at trial, but held that the trial court erred in dismissing a claim based upon negligent failure to protect,[191] specifically basing its decision on the alleged promise by the Sheriff to take care of Lillie.[192] The North Carolina Supreme Court, reversing the Court of Appeals, ordered the trial court's directed verdict reinstated.[193] With regard to the plaintiff's claims of breach of an alleged duty to protect, the

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181 *Id.* at 901.

182 *Id.* at 900.

183 *Id.*

184 *See id.*

185 *See id.*

186 *Id.* at 901.

187 *Id.* at 900.

188 *Id.* at 901.

189 *Id.* at 899.

190 *Id.* The couple's son also filed suit against his father, but that suit was voluntarily dismissed. *Id.*

191 *Id.*

192 *Id.* at 902.

193 *Id.* at 901.

North Carolina Supreme Court noted that the Sheriff's promise to take care of Lillie was vague and not specific or clear enough to rise to the level of a specific promise to protect.[194] In evaluating the negligent retention and negligent supervision claims, the court relied heavily upon Restatement section 317, noting that the duty to control only existed if:

> (a) the [employee]
>
> (i) [was] upon the premises in possession of the employer or upon which the [employee] is privileged to enter only as his employee, or
>
> (ii) is using a chattel of the [employer], and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his [employee], and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.[195]

Noting that there was no evidence that Billy had used a gun provided by the Sheriff or that the department had authorized or required him to carry a gun off-duty, the court found that the "chattel" requirement had not been met.[196] The court then asserted that the Sheriff had no reason to believe that his control of Billy was necessary.[197] He had assigned a deputy to speak with Billy, who reported back that Billy appeared to be okay.[198] The Sheriff himself spoke with Billy, asking him if he needed some time off, and Billy indicated that he did not need time off; the sheriff reported that Billy appeared to be "stable."[199] Thus, the court concluded that the employer did not know, or have reason to know, that some control was necessary.[200]

Finally, the court noted that even if such a duty were owed, any breach of that duty was not the cause of Lillie's murder.[201] Noting that Billy was Lillie's husband and that the murder occurred away from the workplace—at the couple's residence—the court held that the clear cause of Lillie's death was Billy's intentional act.[202] The court stated, "It is a sad but certain fact that some individuals commit despicable acts for which neither society at large nor any individual other than those committing the acts

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194 *Id.* at 902.

195 *Id.* at 904 (citing RESTATEMENT (SECOND) OF TORTS § 317 (1965)).

196 *Id.*

197 *See id.* at 905.

198 *Id.*

199 *Id.*

200 *See id.*

201 *See id.*

202 *See id.*

should be held legally accountable. This is such a case."[203]

Panpat v. Owens-Brockway Glass Container, Inc.,[204] discussed previously, termed a negligent retention claim, also has obvious elements of negligent retention considerations, even though that case was not framed on a negligent retention basis.[205]

Employers should also be aware that there may be a duty to warn a potential domestic violence victim if the employer knows or has reason to know that one of their employees threatens to commit violence against another individual.[206] While not involving a domestic violence incident, *Coath v. Jones* established a duty for an employer to warn a customer of potential violence from one of its employees.[207] The employee involved had a history in violent crimes, and his employment placed him in contact with the individual he eventually assaulted.[208] Noting the employee's prior history and the fact that the employer failed to conduct an adequate background check, the court imposed liability on the employer for breach of a duty to warn, with the court noting that it was foreseeable, in light of the employee's prior history, that such an assault might occur.[209] While no case was located specifically addressing a factual circumstance of domestic violence, it is clear that an employer has a duty to warn a third party of possible harm when that employer has knowledge, or should have knowledge, of an employee's violent tendencies, especially when an individual target has been identified by the employee.[210]

Finally, an area of increasing concern, especially in light of statutory enactments described *infra*, is the employer's potential liability for a tort-based claim of wrongful discharge when that employer elects to deal with potential domestic problems in the workplace by terminating an

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[203] *Id.* at 905.

[204] Panpat v. Owens-Brockway Glass Container, Inc., 71 P.3d 553 (Or. Ct. App. 2003).

[205] *See id.* at 557-58.

[206] *See* Coath v. Jones, 419 A.2d 1249, 1252 (Pa. 1980).

[207] *Id.*

[208] *Id.* at 1249-50.

[209] *Id.* at 1252; *see also* Senger v. United States, 103 F.3d 1437, 1443 (9th Cir. 1996) (providing that summary judgment was not proper where an employer had actual or constructive knowledge of an employee's violent tendencies); Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 349-51 (Cal. 1976) (holding that a psychologist who, during the course of treating a patient, becomes aware of the patient's potential threat of harm to a person, has a duty to warn that person of that threat). *But see* Wood v. Astleford, 412 N.W.2d 753, 756 (Minn. Ct. App. 1987) (providing there is no duty to warn where the employer has no evidence of the employee's violent tendencies).

[210] *See, e.g.*, *Coath*, 419 A.2d at 1252.

employee.[211] Most employers are aware of the statutory regulations applicable to the employment relationship within their state, and most employers are also aware if there are any contractual limitations on their ability to terminate employees.[212] Outside of those concerns and limitations, however, the doctrine of employment-at-will, that is, an employer may terminate an employee for any reason, or no reason, without consequence (again, assuming that no statutory or contractual protection is violated) still governs most employment decisions.[213] The concern for employers, especially in a domestic violence context, should be the fact that employment-at-will is an ever changing concept, as courts in several states have issued decisions eroding the employers ability to terminate for any reason or no reason without consequence.[214] More and more courts are recognizing public-policy exceptions to the employment-at-will rule, and employers must tread carefully in this area when there is a potential tort-based wrongful discharge claim.[215] For the most part, the exceptions to employment-at-will have been based on statutory provisions, an employee's refusal to commit a crime or tort, an employee's refusal to break some legal obligation (for example, a reporting requirement imposed by statute), and employee whistleblowers.[216] Because so many states are enacting statutes providing different protections to domestic violence victims, an employer must be very cautious that any decision to terminate employees because of their involvement in domestic violence does not violate such a statute.[217] Should such a statute exist that provides employment protection to an employee, the employer would not only face any statutory sanctions available, but might also face a tort-based wrongful discharge claim.[218]

Outside of the statutory protections, several employees have attempted to allege a more general "public policy" exception to the employment-at-will doctrine, where their employment was terminated because of involvement in domestic violence circumstances.[219] In *Green v. Bryant*,[220]

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[211] *See* Sandra S. Park, *Working Towards Freedom from Abuse: Recognizing a "Public Policy" Exception to Employment-At-Will for Domestic Violence Victims*, 59 N.Y.U. ANN. SURV. AM. L. 121, 122-24 (2003).

[212] *See* Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 655 (2000).

[213] *Id.* at 653-54.

[214] *See id.* at 656-81 (discussing cases in which courts have found exceptions to the employment-at-will doctrine).

[215] Park, *supra* note 211, at 130.

[216] *See* Ballam, *supra* note 212, at 655, 662-64; Park, *supra* note 211, at 162.

[217] *See* discussion *infra* Part III.B.1, 3, 4.

[218] Park, *supra* note 211, at 162.

[219] *See id.* at 138-44.

the plaintiff, Philloria Green, was raped and severely beaten with a pipe while being held at gunpoint by her estranged husband.[221] Philloria returned to work shortly after receiving medical treatment and informed a doctor in the office where she was employed about the attack.[222] That doctor informed Philloria's employer, Dr. Winston Murphy Bryant, whose response was to terminate Philloria's employment.[223] The court noted that presumably, Philloria was terminated due to Dr. Bryant's concerns of potential physical or emotional danger to other employees, should her husband appear at the workplace and engage in further violent behavior.[224]

Philloria's sued her employer based on several theories of recovery, including an ERISA claim for termination of her medical insurance, wrongful termination in violation of public policy, negligent infliction of emotional distress, intentional infliction of emotional distress, and breach of the covenant of good faith and fair dealing.[225] The trial court granted defendant's motion to dismiss on all but the ERISA claims.[226] With regard to the public policy exception to employment-at-will, Philloria claimed that there was a recognized policy "protecting an employee's right to privacy and protecting victims of crime or spousal abuse."[227] Since Philloria advised one of the doctors in the office of her victimization, the court made short shift of any invasion of privacy claim, as Philloria had disclosed the private facts.[228] Finding that no Pennsylvania statute nor any Pennsylvania case established victims of domestic violence as being a protected class, and noting that Pennsylvania statutes providing benefits to victims of crime provided certain levels of compensation, the court held that there was no public policy that provided an exception to employment-at-will in this instance.[229] The court explained as follows:

> Plaintiff was not discharged because she refused to violate the law, because she complied with the law, or because she exercised a right or privilege granted by the law. Therefore, in the absence of any indication that Pennsylvania has established a clear mandate that crime victims generally, or spousal abuse victims specifically,

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220 887 F. Supp. 798 (E.D. Pa. 1995).

221 *Id.* at 800.

222 *Id.*

223 *Id.*

224 *Id.* at 800 n.2.

225 *Id.*

226 *See id.* at 801-03.

227 *Id.* at 801.

228 *See id.*

229 *Id.*

> are entitled to benefits or privileges beyond those enumerated in the laws, I must conclude that plaintiff's dismissal was not in violation of public policy.[230]

In as much as Dr. Bryant acted within the bounds of law in terminating Philloria, the court similarly dismissed Philloria's negligent infliction of emotional distress and intentional infliction of emotional distress claims—Philloria could not recover for the defendant acting lawfully.[231] Dismissing Philloria's claim that Dr. Bryant had breached an implied covenant of good faith and fair dealing, and quoting case law holding that "all employment contracts, including those construed to be at-will, contained an implied covenant of good faith,"[232] the court noted that there could be no bad faith in the at-will context.[233] The court explained that "[i]t is sufficient to say that there is no bad faith when an employer discharges an at-will employee for good reason, bad reason, or no reason at all, as long as no statute or public policy is implicated."[234]

A Massachusetts case reached a contrary result.[235] In that case, the plaintiff was fired from her job as a reporter after she took time off from work to obtain a protective order to keep her abusive husband away from her.[236] The Massachusetts trial court denied the defendant's motion to dismiss the complaint, noting that it was a violation of Massachusetts public policy to discharge an employee who absented herself from work to pursue judicial remedies against an abusive husband and to assist the police in investigating the case.[237] The court noted, "A victim should not have to seek physical safety at the cost of her employment."[238]

As the representative cases demonstrate, exposure for a wrongful discharge tort claim, should an employer elect to terminate an employee involved in domestic violence, is problematic, and an employer should carefully consider any such decision. In fact, some scholars argue that the doctrine of employment-at-will should be abolished generally, imposing liability when an employee is terminated for any "wrongful" reason.[239] Finally, it would behoove employers to carefully check their general liability policies, as some policies specifically exclude coverage for claims

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230 *Id.*

231 *Id.* at 802-03.

232 *Id.* at 803 (quoting EEOC v. Chestnut Hill Hosp., 874 F. Supp. 92 (E.D. Pa. 1995)).

233 *Id.*

234 *Id.*

235 Apessos v. Mem'l Press Group, 15 Mass. L. Rptr. 322 (Mass. Super. Ct. 2002).

236 *Id.* at 323.

237 *See id.* at 324.

238 *Id.*

239 *E.g.*, Ballam, *supra* note 212, at 687.

that involve intra-employee violence or acts of violence directed at individual employees.[240]

III. STATUTORY CONSIDERATIONS

Employers should also be aware of potential statutory concerns and claims that might arise as a result of domestic violence spilling into the workplace. As all employers are increasingly aware, statutory regulations at the state and federal level play a substantial role in defining employment rights and responsibilities.[241] In fact, as discussed below, state legislatures are taking an increasingly active role in providing protections to victims of domestic violence, especially protections with regard to their employment.[242] Thus, employers dealing with domestic violence in the workplace must carefully evaluate whether any state or federal statute is implicated in any response they may consider.

A. *Federal Statutes*

Every employer is undoubtedly aware of the numerous federal statutes affecting the employment relationship. Everything from the Immigration Reform and Control Act of 1986 (IRCA)[243] to the Worker Adjustment and Retraining Notification Act of 1988 (WARN)[244] to the Employee Retirement Income Security Act of 1974 (ERISA)[245] describes how employers must interact with employees or potential employees. In the context discussed herein, probably the most significant concerns would arise under Title VII of the Civil Rights Act of 1964.[246] However, other statutes may become increasingly important. For example, while not yet achieved as an amendment to the Americans with Disabilities Act (ADA),[247] several states have adopted statutes establishing that status as a

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[240] *See* St. Paul Fire & Marine Ins. Co. v. Seagate Tech. Inc., 570 N.W.2d 503, 507 (Minn. Ct. App. 1997).

[241] *See infra* Part III.

[242] *See infra* Part III.B.

[243] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified in scattered sections of 7, 8, 18, 20, 29, and 42 U.S.C.).

[244] Worker Adjustment and Retraining Notification Act of 1988, 23 U.S.C. §§ 2101-2109 (2000).

[245] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, and 42 U.S.C.).

[246] 42 U.S.C. §§ 2000e-2000e-17 (2000). Of course, other statutes may have some involvement in domestic violence circumstances, such as the Family and Medical Leave Act (FMLA), if an employee needs time off to recover from a domestic violence injury or to care for an injured family member. Family and Medical Leave Act, 29 U.S.C. §§ 2601, 2611-2619, 2631-2636, 2651-2654 (2000).

[247] 42 U.S.C. §§ 12101-12102, 12111-12117, 12131-12134, 12141-12150, 12161-

(*continued*)

victim of domestic violence is a "disability." Similarly, the Occupational Safety and Health Administration (OSHA) may eventually become more important in the domestic violence context, although at the current time it is only marginally applicable.[248] For the most part, however, an employer's main concern in the domestic violence context should arise out of Title VII liability exposure.[249]

Under Title VII, there are two areas of concern: a claim based on straight sex discrimination and a claim based upon sexual harassment, which is a form of sex discrimination.[250] The sex discrimination claim might take one of two forms: disparate treatment[251] or disparate impact.[252]

12165, 12181-12189, 12201-12213 (2000). The ADA does not protect an employee who commits an act of domestic violence, as even if that employee has a legitimate mental illness, the ADA does not protect offensive acts. *See, e.g.*, Hamilton v. Southwestern Bell Tel. Co., 136 F.3d 1047, 1052 (5th Cir. 1998) (stating that "the ADA does not insulate emotional or violent outbursts blamed on an impairment").

[248] While OSHA has adopted standards of addressing violence in particular occupations, it has not yet adopted specific standards addressing concerns of workplace violence applicable to all covered employers. *See* Phillips, *supra* note 25, at 144. Further, those cases where a plaintiff has alleged that OSHA's "general duty" clause (the duty to provide a workplace free of recognized hazards) should be used to establish the standard of care owed by employers have, so far, been unsuccessful. *See, e.g.*, Midgette v. Wal-Mart Stores, Inc., 317 F. Supp. 2d 550, 558 n.1 (E.D. Pa. 2004), *aff'd*, 2005 U.S. App. LEXIS 3573 (3d Cir. Mar. 3, 2005).

[249] It should be noted that the Violence Against Women Act (VAWA) does not provide any employment protection to women who are victims of domestic violence, and does not create a "protected class." Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 27, 28, and 42 U.S.C.).

[250] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 57 (1986).

[251] Disparate treatment occurs when the affected employee is treated differently based upon her sex. Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733, 737 (2002). For example, in *Panpat v. Owens-Brockway Glass Container, Inc.*, 71 P.3d 553, 554 (Or. Ct. App. 2003), the deceased victim threatened a sex discrimination suit if she, instead of her boyfriend, was involuntarily transferred off her shift. *Id.* at 554.

[252] Disparate impact involves a claim that establishes that a facially-neutral employment policy actually has a disparate impact on members of the protected class. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (stating that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); Guz v. Bechtel Nat'l, Inc., 8 P.3d 1089, 1113 n.20 (Cal. 2000) (asserting that "prohibited discrimination may also be found on a theory of disparate impact, i.e., that regardless of a motive, a *facially neutral* employer practice . . . bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse impact on members of the protected class").

A disparate treatment claim might arise where a female employee is treated differently than a similarly-situated male employee,[253] although after nearly forty years, most employers would, presumably, know better.

Disparate impact claims might be more problematic from the employer's perspective. In light of the statistics discussed at the beginning of this Article demonstrating that more females than males are victims of domestic violence,[254] any employer that adopts a policy disfavoring domestic violence victims could arguably be sued on the basis of disparate impact. For example, a policy that mandates dismissal or even unpaid leave for any employee having involvement in domestic violence would disproportionately affect female employees and would therefore violate Title VII.[255]

With regard to those sexual harassment concerns that are germane to this discussion,[256] employers may need to be concerned when the harassment occurs at work, although these concerns may not be too great. As most people are now aware, sexual harassment is unwelcome conduct of a sexual nature.

B. *State Statutes*

Perhaps the greatest area of concern for employers dealing with domestic violence in the workplace arises from the variety of state laws that provide some protection to victims of domestic violence, especially in the employment context. It is at the state level that most protections come and restriction on employment actions have occurred.[257] Each of the various protections that are relevant to this discussion is set out in subsections below.

1. *Unemployment Compensation*

Most states have adopted some form of unemployment compensation—a public policy insurance benefit provided to employees

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[253] *See, e.g.*, Graham v. Long Island R.R., 230 F.3d 34, 39-40 (2d Cir. 2000). For example, the female is terminated for absenteeism when she recovers from injuries due to domestic violence while male employees are routinely given time off to recover from illness or injuries without an adverse impact on their employment.

[254] TJADEN & THOENNES, *supra* note 16.

[255] *See* Jennifer Moyer Gaines, *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?*, 31 TEX. TECH. L. REV. 139, 167 (2000).

[256] As noted earlier, only those sexual harassment claims that fall within the scope of domestic violence issues are addressed herein.

[257] *See* Lisa Lawler Graditor, *Back to Basics: A Call to Re-evaluate the Unemployment Insurance Disqualification for Misconduct*, 37 J. MARSHALL L. REV. 27, 37 (2003).

who lose their jobs through no fault of their own.[258] For the most part, these protections apply to individuals who are laid off due to an economic down turn, for example.[259] However, most of these statutes also provide some type of protection to employees who are terminated unjustly or who quit for "good cause."[260] In the context of this Article, a number of states have adopted statutes providing some protection to employees who are either terminated or required to quit due to domestic violence concerns. States that currently provide unemployment benefits to domestic violence victims include the following: California;[261] Colorado;[262] Connecticut;[263] Delaware;[264] Illinois;[265] Indiana;[266] Kansas;[267] Maine;[268] Massachusetts;[269]

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[258] *See* L'Nayim A. Shuman-Austin, *Is Leaving Work to Obtain Safety "Good Cause" to Leave Employment?—Providing Unemployment Insurance to Victims of Domestic Violence in Washington State*, 23 SEATTLE U. L. REV. 797, 798-99 (2000).

[259] *See* Graditor, *supra* note 257, at 37-38.

[260] *See* Henry H. Perritt, Jr., *Wrongful Dismissal Legislation*, 35 UCLA L. REV. 65, 93 (1987); Shuman-Austin, *supra* note 258, at 810.

[261] CAL. UNEMP. INS. CODE §§ 1030(a)(5), 1032(d), 1256 (West Supp. 2004) (providing that an employee who quits employment because he or she is a victim of domestic violence will be deemed to have met the good cause standard and is entitled to compensation).

[262] COLO. REV. STAT. § 8-73-108(4)(r) (2004) (requiring documentation that the domestic violence occurred, as well as documentation that the involved employee is receiving assistance or counseling from a recognized counseling entity for domestic abuse in order to receive compensation).

[263] CONN. GEN. STAT. ANN. § 31-236(a)(2)(A)(iv) (West 2003) (stating that an individual will not be held ineligible for compensation if he or she quits work because he or she is a victim of domestic violence, provided a reasonable attempt to preserve employment has been made).

[264] DEL. CODE ANN. tit. 19, § 3314(1) (Supp. 2004) (requiring some documentation of the domestic violence circumstances in order to receive compensation).

[265] 820 ILL. COMP. STAT. ANN. 405/601(B)(6) (West 2004) (requiring employees leaving employment to provide written notice to the employer of the reason for leaving and to provide documentation, such as a protective order, police report, medical records, or evidence from a counselor, shelter worker, or health care worker in order to receive compensation).

[266] IND. CODE ANN. § 22-4-15-1(1)(c)(8), (e) (West Supp. 2004) (requiring the employee to provide verification of the domestic or family violence in order to receive compensation).

[267] KAN. STAT. ANN. § 44-706(a)(12), (b) (Supp. 2003) (requiring certification of the violence by a sworn statement or other evidence in order for individual to receive compensation).

[268] ME. REV. STAT. ANN. tit. 26, § 1043(23)(B)(3) (West Supp. 2003) (stating that employee misconduct cannot be found as a means of denying compensation if the

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Minnesota;[270] Montana;[271] Nebraska;[272] New Hampshire;[273] New Jersey;[274] New Mexico;[275] New York;[276] North Carolina;[277] Oklahoma;[278] Oregon;[279] Rhode Island;[280] South Dakota;[281] Texas;[282] Washington;[283] Wisconsin;[284]

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employee's actions "were necessary to protect the employee or an immediate family member from domestic violence if the employee made all reasonable efforts to preserve the employment").

[269] MASS. GEN. LAWS ANN. ch. 151(A), §§ 1(g½), 25(e), 30(c) (West 2004) (requiring the employee to demonstrate the existence of domestic violence by providing a sworn statement or other evidence in order to be eligible for compensation).

[270] MINN. STAT. ANN. § 268.095(1)(8) (West Supp. 2004) (requiring corroborative evidence in order to receive compensation).

[271] MONT. CODE ANN. § 39-51-2111 (2003) (requiring corroborative evidence, limiting ten weeks of benefits in a twelve month period, and stating that an individual becomes ineligible for benefits if that person remains in or returns to the abusive situation).

[272] NEB. REV. STAT. ANN. § 48-628(1)(a) (Supp. 2004) (providing that escaping abuse is good cause for missing work in order to receive compensation).

[273] N.H. REV. STAT. ANN. § 282-A:32(I)(a)(3) (Supp. 2004) (allowing benefits if the individual has relocated to escape the abuse or is able to return to work, but the employer is unable to return the individual to the prior job).

[274] N.J. STAT. ANN. § 43:21-5(j) (West 2004) (providing benefits not only if the employee voluntarily quits, but also if the employee was discharged due to circumstances resulting from domestic violence, so long as the employee provides supporting documentation).

[275] N.M. STAT. ANN. § 51-1-7(A)(1)(b) (Michie Supp. 2003) (requiring medical documentation, legal documentation, or a sworn statement from the claimant in order to receive compensation).

[276] N.Y. LAB. LAW § 593(1)(a) (McKinney Supp. 2004) (providing that voluntary separation may be deemed for good cause and entitle an employee to benefits if it occurred as a result of the employee being a victim of domestic violence).

[277] N.C. GEN. STAT. § 96-14(1f) (2003) (requiring a judicial finding or documentation that the claimant was a victim of domestic violence in order for individual to receive benefits); *see also* Act of June 19, 2003, S. 439, 2003 N.C. Sess. Laws 220.

[278] OKLA. STAT. ANN. tit. 40, §§ 2-405(5), 3-106(G)(8) (West Supp. 2004) (requiring an effective protective order as of the termination date in order for the individual to receive compensation).

[279] OR. REV. STAT. § 657.176(12) (2003) (requiring the individual to have pursued all reasonable alternatives, including seeking reasonable accommodations, restraining orders, or relocation, prior to leaving his or her employment in order for the individual to receive compensation).

[280] R.I. GEN. LAWS § 28-44-17.1 (2003) (providing that an employee shall be entitled to benefits if he or she voluntarily leaves work due to domestic violence if the employee reasonably believes leaving work is necessary and documentation of domestic abuse is provided).

and Wyoming.[285] In addition to the already enacted statutes, a number of states have legislative proposals currently pending, and an employer would be wise to consult the status of these proposals when considering any unemployment compensation exposure. The following states at one time considered or are considering such legislation: Arizona;[286] District of Columbia;[287] Georgia;[288] Hawaii;[289] Iowa;[290] Kentucky;[291] Louisiana;[292] Maryland;[293] Michigan;[294] Mississippi;[295] Tennessee;[296] Vermont;[297] Virginia;[298] and West Virginia.[299] Perhaps of some comfort to employers is the fact that in most instances, the unemployment compensation benefits available to domestic violence victims are not usually charged against the employer's account.[300]

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[281] S.D. CODIFIED LAWS § 61-6-13.1 (Michie Supp. 2003) (providing that benefits are denied to anyone who returns to the abusive situation).

[282] TEX. LAB. CODE ANN. §§ 207.045-.046 (Vernon Supp. 2004-2005) (requiring documentation by means of an active or recently issued protective order, police reports, and a physician statement or other medical documentation in order to receive compensation).

[283] WASH. REV. CODE ANN. §§ 50.20.050(1)(b)(iv), (2)(b)(v), 50.20.100(4), 50.20.240(1)(b), 50.29.020(4)(a)(i) (West Supp. 2004) (providing that an employee is entitled to benefits if he or she left work voluntarily for reasons not attributable to the employer).

[284] WIS. STAT. ANN. § 108.04(7)(s) (West Supp. 2004) (requiring the claimant to have received a temporary or permanent restraining order and to demonstrate that the restraining order has been or is likely to be violated in order to receive compensation).

[285] WYO. STAT. ANN. § 27-3-311(a)(i)(C) (Michie 2003) (providing that an employee is entitled to benefits if he or she was forced to leave work as a result of "being a victim of documented domestic violence").

[286] S. 1058, 45th Leg., 1st Reg. Sess. (Ariz. 2001).

[287] B15-436, 2003 City Council, Reg. Sess. (D.C. 2003).

[288] S. 508, 146th Gen. Assem., Reg. Sess. (Ga. 2001).

[289] S. 2438, 21st Leg., Reg. Sess. (Haw. 2002).

[290] H.R. 2250, 79th Gen. Assem., 2d Sess. (Iowa 2002).

[291] H.R. 171, 2003 Gen. Assem., Reg. Sess. (Ky. 2003).

[292] H.R. 1707, 2004 Leg., Reg. Sess. (La. 2004).

[293] H.R. 541, 416th Gen. Assem., Reg. Sess. (Md. 2002).

[294] H.R. 5508, 2003 Leg., 2003-04 Sess. (Mich. 2004).

[295] H.R. 183, 2004 Leg., Reg. Sess. (Miss. 2004).

[296] H.R. 713, 102d Gen. Assem., 2001-02 Sess. (Tenn. 2001).

[297] S. 282, Leg., 2001-02 Sess. (Vt. 2002).

[298] H.R. 840, 2004 Gen. Assem., 2004 Sess. (Va. 2004).

[299] H.R. 2466, 74th Leg., Reg. Sess. (W.Va. 2002).

[300] *See* Rebecca Smith et al., *Unemployment Insurance and Domestic Violence: Learning from Our Experiences*, 1 SEATTLE J. FOR SOC. JUST. 503, 524 (2002).

2. *Workers' Compensation*

All states have some form of workers' compensation benefits available to persons who are injured on the job or as a result of their employment.[301] In most instances, to be eligible for workers' compensation, the injury must occur at or "arise out of" the claimant's employment.[302] Thus, in order to be eligible for benefits, injured employees may have to prove, in the domestic violence context, that the violence "arose out of their employment," or occurred "in the course of employment."[303] In most instances, if an employee qualifies for workers' compensation or the injury "arose out of" or "in the course of" their employment, workers' compensation is the exclusive remedy available to an injured employee (which would, presumably, bar any tort claim by the injured employee against the employer).[304] There are instances where victims of domestic violence occurring in the workplace have been awarded workers' compensation benefits.[305] However, the greater weight of authority seems to indicate that domestic violence occurrences in the workplace do not "arise out of" the victim's employment and therefore are not covered by workers' compensation.[306] In fact, in some instances, courts addressing the availability of workers' compensation specifically note that workers' compensation benefits may not be available, but instead hold that the injured employee may have a claim for inadequate security.[307] In any instance where the domestic violence occurs at work, it is strongly suggested that an employer immediately check with workers' compensation counsel, and if the state has ruled that workers' compensation benefits are available, those benefits may be the injured employee's exclusive remedy, thus shielding the employer from any tort-liability exposure.[308]

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[301] *See* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 2.08 (2004).

[302] *Id.* § 3.01.

[303] *Id.*

[304] Stephen J. Beaver, *Beyond the Exclusivity Rule: Employer's Liability for Workplace Violence*, 81 MARQ. L. REV. 103, 105 (1997).

[305] *See, e.g.*, Weiss v. City of Milwaukee, 559 N.W.2d 588, 595 (Wis. 1997); Tampa Maid Seafood Prods. v. Porter, 415 So. 2d 883, 885 (Fla. Dist. Ct. App. 1982); Murphy v. Workers' Comp. Appeals Bd., 150 Cal. Rptr. 561, 564-65 (Cal. Ct. App. 1978).

[306] *See, e.g.*, Peavler v. Mitchell & Scott Mach. Co., 638 N.E.2d 879, 882 (Ind. Ct. App. 1994); Johnson v. Drummond, Woodsum, Plimpton & MacMahon, P.A., 490 A.2d 676, 676 (Me. 1985); *In re* Colas v. Watermain, 744 N.Y.S.2d 229, 231 (N.Y. App. Div. 2002); Panpat v. Owens-Brockway Glass Container, Inc., 49 P.3d 773, 778 (Or. 2002).

[307] *See, e.g.*, Arceneaux v. K-Mart Corp., No.Civ.A.94-3720, 1995 WL 479818, at *2 (E.D. La. Aug. 11, 1995).

[308] *See* Beaver, *supra* note 304, at 105.

3. *Anti-Discrimination Provisions*

Many states have current statutes providing protection to domestic violence victims, whether the statute specifically addresses domestic violence or not. Many of the statutes provide protections to victims of crimes, generally, without specific reference to the employee's status as a domestic violence victim. However, Illinois has a statute that specifically protects and addresses concerns related to domestic violence.[309] The Illinois statute provides that any employer, including government agencies and school districts,[310] with fifty or more employees may not discriminate in hiring, firing, or any other fashion, nor retaliate against any individual because the individual is, or is perceived to be, a victim of domestic or sexual violence, or has a family or household member who is, or is perceived to be, a victim of domestic or sexual violence.[311] The statute further prohibits any further discriminatory actions against an employee who takes time off from work to participate in or prepare for any criminal or civil court proceedings relating to the violence against themselves or family members.[312] Further, employers are prohibited from taking actions against the individual on the basis of actual or threatened disruptions in the workplace by someone who has committed or threatened to commit domestic or sexual violence against the individual.[313] The employer is required to make reasonable accommodations, such as changing telephone numbers, making transfers, modifying work schedules, or providing time off, unless such accommodation would pose an undue hardship to the employer.[314] Employees who request such accommodations are protected from termination, retaliation, or other discriminatory actions.[315]

It is important that employers faced with domestic violence in the states indicated carefully check the statute involved, as the variety of protections, interests, and prohibitions, is rather wide. States that currently have statutes providing some protection include the following: Alaska;[316] Arizona;[317] California;[318] Connecticut;[319] Maine;[320] Maryland;[321]

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[309] *See* 820 ILL. COMP. STAT. ANN. 180/15 (West Supp. 2004).

[310] *Id.* 180/10-10.

[311] *Id.* 180/30-(a)(1)(A).

[312] *Id.* 180/30-(a)(1)(B).

[313] *Id.* 180/30-(a)(2).

[314] *Id.* 180/30-(b).

[315] *Id.* 180/30-(a).

[316] ALASKA STAT. § 12.61.017 (Michie 2002) (providing that an employer may not penalize an employee who is required to attend a court proceeding as a victim).

[317] ARIZ. REV. STAT. ANN. § 13-4439 (West Supp. 2004) (providing that an employer may not fire an employee who has to leave work because he or she is a victim of a crime).

[318] CAL. LAB. CODE § 230-230.1 (West 2003) (providing that an employer may not discriminate against an employee who is a victim of domestic violence for taking time off).

Missouri;[322] New York;[323] New York City, New York;[324] and Rhode Island.[325] In addition, several statutes have legislative proposals on the books providing protection against discrimination based upon status as a domestic violence victim. Those states include Hawaii,[326] Kentucky,[327] and Tennessee.[328] In addition, California has a proposal making an employer liable for an "abusive work environment," which may include incidents of domestic violence that occur at the workplace.[329] Again, the employer is cautioned to carefully review with their employment counsel any state statutes that may provide anti-discrimination protection to domestic violence victims.

4. *Leaves of Absence*

A number of states have enacted statutes providing victims of domestic violence the ability to take unpaid leave from their employment and provide employees with protection of re-employment. Again, the details of each state's statute vary significantly, so employers should very carefully review what their state might require. States with current statutes include the following: Alaska;[330] Arizona;[331] California;[332]

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[319] CONN. GEN. STAT. ANN. § 54-85b (West Supp. 2004) (providing that an employer may not deprive an employee who has been a victim of crime of employment).

[320] ME. REV. STAT. ANN. tit. 26, § 850 (West Supp. 2003) (providing that an employer must provide leave from work to an employee who is a victim of domestic violence).

[321] Exec. Order No. 01.01.1998.25, 25:23 Md. R. 1684 (1998) (prohibiting unfair treatment of employees who are victims of domestic violence by state employers).

[322] MO. ANN. STAT. § 595.209.1(14) (West 2003) (providing that an employer may not fire or discipline an employee who must testify in a court proceeding as a victim of domestic violence or as a victim's family member).

[323] N.Y. PENAL LAW § 215.14 (McKinney 1999) (providing that it is unlawful for an employer to penalize an employee who is a victim of domestic violence).

[324] NEW YORK CITY, N.Y., ADMIN. CODE § 8-107.1 (2003) (providing that it is unlawful for an employer to refuse to hire or discharge an employee because he or she is a victim of domestic violence); NEW YORK CITY, N.Y., LOCAL LAW 75 (2003) (providing that it is unlawful to discriminate against individuals based upon their status as a victim of domestic violence).

[325] R.I. GEN. LAWS § 12-28-10 (2002) (providing that an employer may not refuse to hire or fire an employee solely because he or she must leave work to seek or obtain a protective order).

[326] H.R. 2021, 22d Leg., Reg. Sess. (Haw. 2003).

[327] H.R. 487, 2004 Gen. Assem., Reg. Sess. (Ky. 2004).

[328] S. 1943, 103d Gen. Assem., Reg. Sess. (Tenn. 2003).

[329] Assem. 1582, 2003-04 Reg. Sess. (Cal. 2003).

[330] ALASKA STAT. § 12.61.017 (Michie 2002) (providing that an employer may not

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Colorado;[333] Connecticut;[334] Hawaii;[335] Illinois;[336] Maine;[337] Missouri;[338] and New York.[339] In addition, New York City has adopted an ordinance requiring "reasonable accommodation" to victims of domestic violence, including leave from work.[340] Also, Miami-Dade County, Florida has adopted a local ordinance providing unpaid leave for employees who are victims of domestic violence to seek medical or dental care, legal assistance, counseling, and to attend court proceedings.[341] Furthermore, a number of states have legislative proposals pending or have considered

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take away the employment status, wages, and benefits payable to an employee who is a victim of domestic violence because the employee has to attend court proceedings).

[331] ARIZ. REV. STAT. ANN. § 13-4439 (West Supp. 2004) (providing that an employer may not dismiss an employee who is a victim of a crime because the employee leaves work).

[332] CAL. LAB. CODE § 230-230.1 (West 2003 & Supp. 2004) (providing that an employer may not discriminate against or discharge an employee who is a victim of domestic violence and leaves work to obtain particular services or participate in particular proceedings and activities).

[333] COLO. REV. STAT. § 24-34-402.7 (2003) (providing that an employer must permit an employee who is a victim of domestic violence to take up to three days leave from work in one twelve-month period to obtain services and attend proceedings designed to help and protect the employee).

[334] CONN. GEN. STAT. ANN. § 54-85b (West Supp. 2004) (providing that an employer is prohibited from threatening to fire an employee who has to leave work to a attend criminal proceeding).

[335] HAW. REV. STAT. § 378-72 (Supp. 2003) (providing that an employer must permit an employee who is a victim of domestic violence to take up to thirty days leave from work in a calendar year to obtain particular services and attend particular proceedings).

[336] 820 ILL. COMP. STAT. ANN. 180/20 (West Supp. 2004) (providing that an employee who is or has a family member who is a victim of domestic violence is permitted to take unpaid leave from work to obtain particular services and attend particular proceedings).

[337] ME. REV. STAT. ANN. tit. 26, § 850 (West Supp. 2003) (providing that an employer must give "reasonable and necessary leave from work" to an employee who is a victim of domestic violence).

[338] MO. ANN. STAT. § 595.209(1)(14) (West 2003) (providing that an employer may not discharge or discipline an employee who is a victim of domestic violence or the victim's immediate family for participating in a court proceeding).

[339] N.Y. PENAL LAW § 215.14 (McKinney 1999) (providing that an employer is prohibited from discharging or penalizing an employee who is a victim of domestic violence for attending court proceedings).

[340] NEW YORK CITY, N.Y., LOCAL LAW 75 (2003).

[341] MIAMI-DADE COUNTY, FLA., CODE § 11A-61 (1999).

such legislative proposals. Such states include the following: Alaska;[342] Arizona;[343] Delaware;[344] Georgia;[345] Kentucky;[346] Mississippi;[347] New Hampshire;[348] New York;[349] Pennsylvania;[350] Tennessee;[351] Washington;[352] and Wisconsin.[353]

5. *Restraining/Protective Orders*

A number of states have proposed or enacted statutes allowing employers to seek for protective or restraining orders, where violence, harassment, or stalking of employees has occurred.[354] Many states that provide this protection allow a protective order or restraining order to be issued when the employer shows that the employee has experienced some form of violence or stalking or that a credible threat of violence or stalking can be demonstrated.[355] In a few of the states, the employer must demonstrate that the employee involved is in imminent danger, or that irreparable harm will befall the employee if the protective order is not granted.[356] Some of the statutes allow the employer to obtain a restraining or protective order in its own name, rather than on behalf of the employee,[357] and some require that an employee who is the target of violence must be consulted prior to the employer's seeking the order.[358]

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342 H.R. 391, 23d Leg., Reg. Sess. (Alaska 2004).

343 S. 1552, 45th Leg., 1st Reg. Sess. (Ariz. 2001).

344 H.R. 276, 141st Gen. Assem., Reg. Sess. (Del. 2001).

345 H.R. 508, 147th Gen. Assem., Reg. Sess. (Ga. 2003).

346 H.R. 171, 2003 Gen. Assem., Reg. Sess. (Ky. 2003).

347 H.R. 739, 2002 Gen. Assem., Reg. Sess. (Miss. 2002).

348 H.R. 747, 158th Gen. Court, 2003 Sess. (N.H. 2003).

349 Assem. 31, 225th Ann. Leg. Sess., Reg. Sess. (N.Y. 2003).

350 H.R. 375, 186th Gen. Assem., Reg. Sess. (Pa. 2003).

351 H.R. 315, 102d Gen. Assem., 2001-02 Sess. (Tenn. 2001).

352 S. 5329, 57th Leg., Reg. Sess. (Wash. 2001).

353 Assem. 269, 2003-04 Leg., 96th Sess. (Wisc. 2003).

354 *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-1810 (West 2003); ARK. CODE ANN. § 11-5-115 (Michie 2002); CAL. CIV. PROC. CODE § 527.8 (West Supp. 2005); COLO. REV. STAT. § 13-14-102 (2003); GA. CODE ANN. § 34-1-7 (2004); IND. CODE ANN. § 34-26-6 (West Supp. 2004); NEV. REV. STAT. ANN. 33.200-.360 (Michie 2002); N.C. GEN. STAT. §§ 95-260 to -271 (Supp. 2004); R.I. GEN. LAWS § 28-52-2 (2003); TENN. CODE ANN. §§ 20-14-101 to -109 (Supp. 2003).

355 *See supra* note 354.

356 *See, e.g.*, NEV. REV. STAT. ANN. 33.270(4)(a) (Michie Supp. 2003); R.I. GEN. LAWS § 28-52-2(b) (2003); TENN. CODE § 20-14-101(2) (Supp. 2003).

357 *See, e.g.*, IND. CODE ANN. § 34-26-6-6.

358 *See* NEV. REV. STAT. ANN. 33.260 (Michie 2003).

Those states with current statutes include the following: Arizona;[359] Arkansas;[360] California;[361] Colorado;[362] Georgia;[363] Indiana;[364] Nevada;[365] Rhode Island;[366] and Tennessee.[367] In addition, a number of states have legislative proposals pending, with concerns similar to those contained in already enacted legislation *vis-ă-vis* the necessity of the employer consulting with the employee, being able to obtain an order in its own name, etc. Proposals are pending in the following states: Hawaii;[368] Kentucky;[369] New Jersey;[370] New York;[371] North Dakota;[372] Oklahoma;[373] and Washington.[374]

As noted in the introduction to this particular section, an employer must be very wary, as state statutes may have a dramatic impact on their ability to deal with incidents of, and response to, domestic violence in their workplace. Again, in light of the anti-discrimination provisions mentioned above, an employer must be very wary, lest it face claims under state or federal anti-discrimination laws.

IV. CONCLUSION

It should be apparent that employers in the United States will, at some time, probably have to deal with issues of domestic violence that spill over into the workplace. Because many states have statutorily-provided protections to victims of domestic violence, an employer is limited in what actions it may take against an employee who is a victim of domestic violence; if the employer fails to comply with the statutory protections, it may be sued by either the victim or a governmental agency, depending upon the statute. Additionally, anti-discrimination statutes, such as Title VII,[375] may preclude an employer from adopting any blanket policy

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359 ARIZ. REV. STAT. ANN. § 12-1810 (West 2003).

360 ARK. CODE ANN. § 11-5-115 (Michie 2002).

361 CAL. CIV. PROC. CODE § 527.8 (West 2004).

362 COLO. REV. STAT. § 13-14-102 (2003).

363 GA. CODE ANN. § 34-1-7 (2004).

364 IND. CODE ANN. § 34-26-6 (West Supp. 2004).

365 NEV. REV. STAT. ANN. 33.200-.360 (Michie Supp. 2002).

366 R.I. GEN. LAWS § 28-52-2 (2003).

367 TENN. CODE ANN. §§ 20-14-101 to -109 (Supp. 2003).

368 H.R. 385, 22d Leg., Reg. Sess. (Haw. 2003).

369 H.C.R. 16, 2004 Gen. Assem., Reg. Sess. (Ky. 2004).

370 Assem. 166, 211th Leg., 2004-05 Sess. (N.J. 2004).

371 Assem. 6254, 2003-04 Gen. Assem., Reg. Sess. (N.Y. 2003).

372 H.R. 1057, 58th Leg., 2003 Sess. (N.D. 2003).

373 H.R. 1804, 49th Leg., 1st Sess. (Okla. 2003).

374 S. 6024, 58th Leg., Reg. Sess. (Wash. 2003).

375 42 U.S.C. §§ 2000e-2000e-17 (2000).

addressing employees' domestic-violence related concerns in the workplace, as such policies would statistically, and disproportionately, impact female employees more than male employees.

An employer that therefore maintains the employment of a victim of domestic violence also faces potential tort liability based upon failure to provide a safe workplace and failure to provide adequate security. This is especially true where the employer has notice that an employee is a victim of domestic violence. While the courts have indicated that issues of foreseeability and causation need to be addressed in any such tort claims, employers should rightfully be concerned that issues of forseeability and causation are all too often determined by a jury, which evaluates such issues in hindsight. While an employer might be tempted to adopt a "don't ask, don't tell" attitude towards its employees' private lives, domestic violence victims still usually end up bringing their problems to work, even if only through instances of increased absenteeism and tardiness. Thus, an employer that discusses an employee's work habits to rightfully require that employees show up and show up on time will probably have to deal with notice issues when it is advised by the employee that he or she was late because the employee's intimate partner physically beat him or her.

Which lawsuit would you like?